Nos. 94-66 and 94-82

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

MIKE MOORE, et al.,

*Appellants,*

vs.

JOHNNY DUPREE, et al.,

*Appellees.*

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

*Appellants,*

vs.

JOHNNY DUPREE, et al.,

*Appellees.*

**On Appeal From The United States District Court For The Southern District Of Mississippi**

## SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215
(601) 373-0170

WILLIAM E. ANDREWS
P. O. Box 130
Purvis, MS 39475
(601) 794-8053

*Counsel for Appellants The Lamar County Board of Education and Trustees, in Their Official Capacities, Charles L. Cameron, James Sider, Tommy Graham, Freddie G. Howell and Fred Boudreaux*

March 28, 1995

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## I. THE SOLICITOR GENERAL OVERLOOKS SERIOUS ARGUMENTS ON THE MERITS OF THE SECTION 5 PRECLEARANCE ISSUE, WHICH ARGUMENTS RENDER THE PRECLEARANCE ISSUE SUBSTANTIAL

The Solicitor General takes the contradictory positions that (1) state courts have an important role in deciding voting rights issues[1] (2) but that the factually and legally parallel *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), does not constitute any precedent for the lower federal courts in voting cases. The Solicitor General urges that *Western Line* is not binding on "federal" Section 5 issues and further is subject to doubt because of the vacillation of the decision below, since on the appeal the three-judge court has reversed its previous decision and now holds that Mississippi's repealer of Section 611 has not been precleared. This observation by the Solicitor General (Brief of Solicitor General, p. 14, p. 14, n. 4) regarding the progress of the decision below does nothing to propel the argument forward in answer to this Court's question.

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[1] On page 19, note 10, the Solicitor General suggests the remedy question could be certified to the Mississippi Supreme Court. "Those proceedings would be directed to the question of the severability of the non-voting aspects of Section 611 from the voting aspects of the statute. If there is some means to obtain a definitive resolution of that issue as a matter of state law from state courts, the district court may want to make use of it."

This case presents, and this Court has directed the Solicitor General to answer, a substantial question regarding state law impact on Section 5 preclearance. School districts able to litigate in state court will be governed by the Mississippi State Supreme Court's decision in *Western Line*. Those unfortunate enough to end up in federal district court will be governed by the opposite holding on remand of the three-judge district court below. The Solicitor General does not address the heart of the question proposed by this Court and the question lurking after the decision in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), where this Court held that a State has primacy in the redistricting domain under Section 2 of the Voting Rights Act. Should this state primacy also exist under Section 5? The Solicitor General posits no solution for the collision of State and federal decisions in this Section 5 voting context. This question is substantial.[2] (See the Jurisdictional Statement of the Lamar County Board of Education, et al., pp. 16-18).

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[2] Further in summarizing Judge Barksdale's dissent on the merits below, the Solicitor General omits mentioning Judge Barksdale's holding that preclearance was effected because the United States Justice Department " . . . regulations then in effect *did not require* covered jurisdictions to submit a copy of the prior law being amended or repealed," 28 C.F.R. §51.25 (1986), "but that the current regulation requires '[a] copy of any ordinance, enactment, order or regulation embodying the voting practice that is proposed to be repealed, amended or otherwise changed.' " 28 C.F.R. §51.27 (1992). J.S.App. 33a.

## II. THE REMEDY FOR A VOTING RIGHTS VIOLATION BELOW, IF ANY, IS ENJOINING THE NON-PRECLEARED VOTING CHANGE. THE ISSUE IS NOT WHETHER CHANGE AFFECTING VOTING IN A PARTICULAR STATUTE IS SEVERABLE FROM THE OTHER CHANGES OF THE STATUTE.

The Solicitor General argues that "the remedial determination in . . . " this "case depends on whether the portion of the statute that is not invalid is severable, as a matter of state law, from the portion that is invalid." (p. 15) That statement is followed by a citation candidly beginning with "Cf.", "e.g.", and a string cite. The Solicitor General does cite precedent of this Court directly on point, *Dotson v. City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd mem.*, 456 U.S. 1002 (1982).

*Dotson* comes from the State of Mississippi. The City of Indianola had annexed several large land areas, without obtaining preclearance. The three-judge district court held as a matter of law that the annexation would not be rolled back. The remedy would be that the persons in the annexed areas could not vote in city elections until the annexations had been precleared.

Here, the City of Hattiesburg has undergone many annexations into the Lamar County School District's geographic area. If those annexations are valid, as with *Dotson*, persons in the annexed areas would continue attending school in and paying taxes to the pre-annexed area Lamar County Schools, but would lose their right to vote in Lamar County School elections. In the identical situation, *Dotson's* severability was not discussed, and this Court affirmed injunctions restricting only the right to vote of citizens in the newly annexed areas.

Here, if there is a Section 5 violation, the remedy is to enjoin Lamar County citizens living within the Hattiesburg city limits from voting in Lamar County School Districts. Their children may continue attending the Lamar County Schools and their tax money will support the Lamar County Schools, just as was done in *Dotson*. The question regarding remedy is substantial. Based on *Dotson*, this Court should resolve the remedy issue and remand with directions to the three-judge district court.

The argument of the Hattiesburg School District in its Second Supplemental Brief in Support of Motion to Affirm that "in substance" the severability issue was decided by the district court is without any support of record. In its opinion, the three-judge district court did hold that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable." J.S.App. 37a. The Defendants promptly moved for a new trial, to alter or amend the court's order, or for a remedy. J.S.App. 227a-232a, 233a-238a. Without discussion, the district court summarily denied the Defendants' motions. *Id.* Section 1a, 2a. The Solicitor General supports Lamar County's position that the district court gave the plaintiffs a declaratory judgment, and not an injunction, and so is inadequate as a remedy. (Brief of Solicitor General, p. 17, n. 8). The Solicitor General argues therefore a remand is necessary to create an injunctive remedy. *Id.*

## CONCLUSION

This District Court's determination that the repeal of Section 611 was not precleared and not repealed by implication is inconsistent with precedent of the highest court of the State of Mississippi, inconsistent with then existing federal regulations, and should be reversed. In the alternative, if this Court finds Section 611 was not precleared, this Court should follow its precedent in *Dotson* and hold that the appropriate remedy is one that affects voting, that is, annexed residents in Lamar County cannot vote in Lamar County School District elections.

Respectfully submitted,

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215-1725
(601) 373-0170

WILLIAM E. ANDREWS, III
P. O. Box 130
Purvis, MS 39475
(601) 794-8053

*Counsel for Appellants The Lamar County Board of Education and Trustees, in Their Official Capacities, Charles L. Cameron, James Sider, Tommy Graham, Freddie G. Howell and Fred Boudreaux*

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